ORIGINAL ARTICLES

Scientific and General

MALPRACTICE SUITS—THE RISING TIDE*

LOUIS J. REGAN, M.D., LL.B.
Los Angeles

PRIOR to the beginning of this century few malpractice claims were advanced against physicians. After 1920, the malpractice claims incidence began to rise sharply. The depression decade of the 1930's witnessed a tremendous increase in the number of claims and suits. In 1937 about 4,000 physicians were sued for malpractice in the United States. With war prosperity there was some reduction in the number of claims but there is already indication that, in this respect, the war is over; that it is again open season in so far as doctors are concerned.

PROCEDURES DESIGNED TO PROTECT THE PUBLIC

It is not denied that there are meritorious malpractice claims—cases where a patient suffers injury due to the ignorance or negligence of his medical attendant The burden and the duty of dealing with this problem is, in public opinion, placed squarely on the medical profession. The responsibility is ours; we acknowledge it and are endeavoring to meet it. There is a primary filtering of the incompetent and unprincipled by the State Board of Medical Examiners. County Medical Association reduce the opportunities of the charlatan to mulct the public. Applicants for membership in medical associations are carefully surveyed and weighed as to professional qualifications and personal integrity. Hospital staffs endeavor to exclude the poorly qualified and the careless physician from the hospital wards. Practicing physicians are constantly encouraged, and they are offered opportunities, to keep abreast of advances and developments in the profession. The organized group has, however, little disciplinary power over its members and none at all over non-members. Its force, its influence, is largely moral, exercised through educational activities.

As a group we are anxious to do everything possible to protect the patient from the incompetent or dishonest physician. We are aware that nothing so injures the public relations of the profession, its prestige and standing in the public eye, as does the wave of misunderstanding and ill-will engendered by the great number of malpractice claims. It is obvious, however, that although the public are urged to seek out well qualified physicians to care for them, they do not have to, and often do not, follow this good advice. In the public interest we have sought and continue to seek the passage of a basic science law.

PUBLIC IS INDIFFERENT CONCERNING UNJUSTIFIED MALPRACTICE CLAIMS

The more serious factor in the malpractice problem is created by the large and constantly increasing number of unjustified malpractice charges which are being brought against physicians. The seriousness of the situation is only now beginning to be recognized by physicians. As yet it is viewed with complete disinterest by other groups in the community. It may be pointed out that there is a great difference between an ordinary negligence action and a malpractice action brought against a physician. In a malpractice action the character of the defendant, his personal integrity, is assailed —his professional reputation is injured by the mere filing of the action.

So common have malpractice accusations become that the very word, "malpractice," now brings to the mind of the average person the picture of a physician mistreating or neglecting his patient. So common have these claims become that, in this locality at any rate, whenever a bad result occurs, there is a strong tendency to blame the attending physician. If the patient does not himself think of blaming the doctor, some one usually suggests it to him.

Not only is the whole profession injured, but the public interest is deleteriously affected by this condition. A physician if he has had his malpractice eyes opened will give thought to safeguarding himself, while he is treating a patient, because an unjustifiable malpractice claim may eventuate from the case. And those of you who know anything about this subject know that, commonly, it is the most reputable among us who is attacked. This, perhaps, is on the theory that he who has most to lose can most easily be softened up to buy his peace.

HOW MALPRACTICE SUITS DESTROY PUBLIC'S CONFIDENCE IN PHYSICIANS

It is fundamental that confidence on the part of the patient toward his physician is a vital element in the physician-patient relationship. The patient's confidence in his physician distinctly contributes to his recovery. The unwholesome situation which the malpractice sore has created is breaking down the public's confidence in the profession. The public is gradually being sold the idea that protection against the profession is needed. This attitude is reflected, more and more frequently, in the attitude of jurors and in the verdicts rendered by juries.

In a recent case, considering the evidence in the record and the Court's instructions, the jury's failure to agree upon a verdict for the defendant was a tremendous surprise to all who had followed the case. It was illuminating, to hear dissenting jurors say that they did not believe any defense witness—this particularly in view of the fact that it would not be possible, in any case, to present witnesses of higher credibility.

A further indication of the unfortunate trend in malpractice, is seen in another case wherein the jury brought in a verdict for the plaintiff, the patient. The Court, in granting a motion for a new trial, said in substance that he could not find one iota of evidence in the record to sustain the jury's verdict.

TREND OF JUDGMENTS IN MALPRACTICE CASES IS AGAINST THE DEFENDANTS

Further evidencing that the trend in malpractice cases is against the defendant, it is pointed out that the doctrine of *Res Ipsa Loquitur* in its application to malpractice cases has been extended, and that the concept of common knowledge and observation has been widened. Apparently it is thought that a lay jury may be considered capable to differentiate between an eye, the sight of which was destroyed by a corrosive solution, and an eye blind as the result of infection. And it has recently been held that whether a tendon was severed or not was within common knowledge and observation, expert testimony being necessary. The "experts" on such a jury might very advantageously be medically employed.

THE LAW IN RESPECT TO COMPELLING DISCOVERY BEFORE TRIAL

As background to the next, and to my mind, the most important point I have to discuss, it is pointed out that

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the common law provided no means whereby a party to a law action could be compelled to disclose facts or to produce documents for the use of his opponent. On the premise that there was a failure of justice at common law, equity provided a remedy.[1] Bills of Discovery were made available to parties to actions to require disclosure by the defendant of facts, deeds, documents, or other things in his exclusive knowledge or possession which were necessary to the party seeking the discovery as a part of a cause or action pending. In many jurisdictions, statutes now exist which provide for the pre-trial examination of parties in actions at law.[2]

From studying the development and the course of the law in respect to compelling discovery before trial, both in equity and under statute, the conclusion, in my opinion, is inescapable that only the disclosure of material facts was within the contemplation of the Courts or legislatures.

It is further pointed out that at common law a party to an action cannot be compelled to testify against himself. In many jurisdictions, under statue, a party to an action has the right to call the adverse party and to compel him to testify.

California Code of Civil Procedure, Sect. 2055, reads as follows, (in part):

"A party to the record of any civil action or proceeding or person for whose immediate benefit such action or proceeding is prosecuted or defended (or the directors, officers, superintendent, or managing agent of any corporation which is a party to the record), may be examined by the adverse party as if under cross-examination, subject to those rules applicable to the examination of other witnesses."

Similar statutes exist in a number of states. The courts of several of these states have had occasion to construe these statues, to establish their meaning, application, and limitation. It is fair, I think, to say that characteristically it has been emphasized that the statute has application to *material facts*. One of the earliest of these cases was that of Langford v Issenhuth,[3] a 1912 South Dakota case. In that case the court constantly reiterates *fact, material fact.*

In most of the succeeding cases, in the several states, reference is made to the South Dakota case.

In Osborn v Carey,[4] a malpractice case, the Supreme Court of Idaho said the statute was not intended to enable an adverse party to call an opposing party as an expert. It is similarly held in an Ohio case—Forthofer v Arnold.[5]

In the month of April, 1944, two decisions came down which dealt with the point whether, under statute permitting the calling of the adverse party, the defendant physician in a malpractice action may be required to give expert testimony. A New Jersey court[6] held that the defendant may not be made an expert by the plaintiff. The California Supreme Court[7] held that he may be made a plaintiff's expert. Both courts quote from Langford v Issenhuth and, in part, seem to base their reasoning on the holding in that case. I cannot reconcile the divergent conclusions. The effect, insofar as we in California are concerned, is unfortunate.

LIMITATIONS PLACED UPON CROSS-EXAMINATIONS

In the ordinary examination of a witness, first by direct examination and then by cross-examination, there is under the general rule, some limitation placed upon the cross-examination; cross-examination must be kept within the scope of the direct examination. In People v Buzzel,[8] a California court said that it is elementary that cross-examination should not be permitted to go beyond the scope of the direct examination. But under a statute permitting the calling of the adverse party and examining him as if under cross-examination, there has been no direct examination to set a limiting standard; the scope of the examination is, to all practical purposes, unlimited. In Good v Brown (Cal.),[9] it was said that in view of C.C.P., Sect. 2055, which permits a litigant to call his adversary and subject him to cross-examination as to any relevant matter without waiting for a foundation to be laid by previous direct examination, the Court does not commit error in permitting a wide cross-examination of a defendant.

ON HYPOTHETICAL QUESTIONS

The medical expert witness may be, and usually is, asked hypothetical questions. Under the general rule, every fact which is assumed in the hypothetical question asked of the expert witness must have some evidence in the record to sustain it. Under a rule, permitting the defendant-physician in a malpractice case to be made an expert witness for the plaintiff when called as an adverse witness, not only is he subject to unlimited cross-examination not binding on the plaintiff, but in actual practice he is commonly asked hypothetical questions, the facts assumed having at that time no foundation whatever in the record and at times being actually contrary to the only available evidence.

It is very well to say that the defendant may prove to strike if matters are not connected up, if no evidence is forthcoming to support this or that fact among the many which have been assumed, but it is asking of a lay jury more than is humanly possible to suggest that the prejudicial effect be eliminated from their minds.

ON PRE-TRIAL DEPOSITIONS

The defendant-physician, called by the plaintiff under the statute, may be the first witness to testify at the trial. Moreover, upon pretrial deposition, he is asked opinion questions and, upon citation if such is necessary, required to answer them when there is, of course, no record at all upon which to found them. Plaintiffs are encouraged, under these circumstances, to file actions which have no merit and thereafter to exercise the opportunity which is provided them to go on "fishing expeditions." Equity Courts rightfully exercised care to see to it[10] that Bills of Discovery were not so used or misused.

It is submitted that in these circumstances the defendant-physician is placed under an unjust and impossible burden, and that further consideration of his present unenviable position is indicated. It is suggested that the best solution would be an amendment to the procedural statute to incorporate, in substance, that no witness may be required to give expert opinion testimony unless he has previously contracted to do so.

MALPRACTICE SUITS AS A PRESENT-DAY PLAGUE

I have tried to show that malpractice is a present day plague; that its effects are destructive; that because of it medical prestige is suffering and public confidence in the profession is breaking down; and that this condition is reflected in juries' verdicts and Court's decisions.

I have endeavored also to emphasize that the malpractice problem is our problem. It is distinctly up to the medical profession to solve this problem. Why should the physicians of this state go on being easy targets, sort of "sitting birds" for any sharpshooter who decides he has found an easy way to get some money or to get out of paying his bill?

COMMENT

No one has come forward to help us. Surely no intelligent person can criticize us for taking any action

necessary for our self protection. Physicians would be unbelievably stupid to continue, blindly and supinely, to permit themselves to be publicly pilloried by unjust charges against reputation and character.

It will indeed be a grand day when our doctors cease to expect that some "Malpractice Santa Claus" is going to do this job, and finally decide to take any steps necessary to terminate this evil.

Suppose, for illustration, the doctors decide for the purpose of malpractice claims prevention that it is necessary to have an independent physician join the attending physician in the care of each and every patient, saving the most simple, and even in such a case unless recovery is immediate and perfect? Or three or four independent physicians? This procedure would solve the malpractice problem. Milder measures, universally adopted, might be sufficient. But, after twenty years of close observation and study in this field, I am convinced that no marked improvement may be anticipated or even hoped for until the organized group, and the individuals making it up, become fully aroused and act accordingly.

A POLICY OF OFFENSE, NOT OF DEFENSE, IS INDICATED

The rising tide of malpractice is engulfing us. It more than any other thing threatens to flood us into the sea of state medicine. We have until now been entirely on the defensive. We must assume an offensive attitude. Let us raise our voices in insistent demand that the governing bodies of our State and County Associations undertake a continuous, aggressive campaign to end the malpractice racket, and that any action necessary to bring about the desired result, be taken.

6777 Hollywood Boulevard.

REFERENCES

1. 27 C.J.S. Discovery, Sect. 53.
2. California Code of Civil Procedure, Sect. 2021.
3. 134 N.W. 88.
4. 132 Pac. 967.
5. 21 N.E. (2d) 869.
6. Hull v Plume (N. J.), 37 Atl. (2d) 53.
7. Lawless v Calaway (Cal.), 147 Pac. (2d) 604.
8. 104 Pac. (2d) 503.
9. 196 Pac. 299.
10. Yorkshire Worsted Mills v National Transit Co. (Pa.), 190 Atl. 897; Midwest Mfg. Co. v Staynew Filter Corp., 12 Fed. Supp. 876; Colvocoresses v W. S. Wasserman Co. (Del.), 13 Atl. 439; Peyton v Wehane (Conn.), 11 Atl. (2d) 800.

Navy Commends U. C. Medical School

A letter of commendation from the Navy Department to the University of California Medical School for playing "a significant part" in training doctors for the Medical Corps under the V-12 Program has been received by Dr. Francis S. Smyth, dean of the school.

Signed by Vice Admiral Louis Denfield, chief of naval personnel, the letter states in part:

"The whole-hearted coöperation of your administration, the excellence of your facilities and the skill of your instructional staff helped make possible an immense expansion which, because of the efforts of medical colleges, saw no lowering of professional standards.

"The defeat of Japan has now made it possible for the Navy Department to discontinue its medical training program and for medical colleges to return to the education of doctors for civilian practice.

"May I assure you that it is with mingled regret and pride that the Navy Department leaves the scene of medical education; regret that our association has ended and pride in the knowledge of a mission accomplished."

HEPARIN AND DICUMAROL—ANTI-COAGULANTS*

THEIR PROPHYLACTIC AND THERAPEUTIC USES

PAUL M. AGGELER, M. D.
San Francisco

THE brilliant studies of Best and his associates[1] at the University of Toronto, and of Link and his coworkers[2] at the University of Wisconsin have made available for clinical use two potent anti-coagulant drugs, heparin and dicumarol** for the prophylaxis and treatment of thrombosis and embolism. It is the purpose of this communication to discuss the physiological basis of anti-coagulant therapy, the indications for the use of the anti-coagulant drugs and their methods of administration, and the hemorrhagic complications which may follow their use.

Anti-coagulant therapy has not been used in a sufficient number of cases to allow a comparison of the results with those of other methods of treatment such as lumbar sympathetic block, proximal venous ligation and early ambulation. All that can be said at the present time is that the anti-coagulants appear to be effective remedies. The evaluation of the relative merits of the various forms of therapy must await further study.

THE PHYSIOLOGICAL BASIS OF ANTI-COAGULANT THERAPY

There is a close relationship between thrombus formation and blood coagulation although the two processes are not identical. In the process of blood coagulation the platelets disintegrate and thereby yield thromboplastin. The release of this substance leads ultimately to the formation of a clot, composed of all of the cellular elements of the blood enmeshed in interlacing strands of fibrin. In the formation of a thrombus, the function of the platelets is to agglutinate on the endothelial surface of the blood vessel at the site of injury. Under varying conditions three types of thrombi may be formed: the "white" thrombus, composed entirely of agglutinated platelets, the "red" thrombus, which is similar to an ordinary blood clot, and the "mixed" thrombus which contains lamellae of platelet masses and coagulated blood. All substances which inhibit coagulation of the blood also prevent agglutination of the platelets. The use of anti-coagulants to prevent thrombus formation is therefore a rational procedure, regardless of the type of thrombus which may be formed.

In the evolution of a white thrombus, the agglutinated platelets become hyalinized and much of the fluid content of the thrombus is resorbed. Organization takes place through ingrowth of cells from the lining of the blood vessel.

When a white or mixed thrombus completely occludes a vessel, a red thrombus forms in the channel proximal to it, where the blood has ceased to flow. Such thrombi usually become firmly attached to the vessel wall and rarely lead to embolus formation. However, a thrombus may propagate without completely occluding the lumen of a vein and may float in the passing blood stream with few or no attachments to the vascular endothelium except at its point of origin. Detachment, in whole or in part, of such thrombi gives rise to the vast majority of pulmonary emboli. Anti-coagulant therapy, properly ad-

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From the Department of Preventive Medicine, University of California, San Francisco Campus.

** Dicumarol is the collective trademark of the Wisconsin Alumni Research Foundation, which controls the use thereof.